Robertshaw Controls Company *and* International Union of Electrical Radio and Machine Workers, AFL-CIO-CLC, and its Local 194. Case 10-CA-14508

September 9, 1982

SUPPLEMENTAL DECISION AND ORDER

BY MEMBERS FANNING, JENKINS, AND ZIMMERMAN

On February 29, 1980, Administrative Law Judge Robert Cohn issued the attached Decision in this proceeding. Thereafter, Respondent and the General Counsel filed exceptions and briefs in support thereof. On June 4, 1980, the National Labor Relations Board issued a Decision and Order Remanding Proceeding to Administrative Law Judge.[1] On December 2, 1980, Administrative Law Judge Robert Cohn issued the attached Supplemental Decision. Thereafter, Respondent and the General Counsel filed exceptions and briefs in support thereof.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record[2] and the attached Decisions in light of the exceptions and briefs and has decided to affirm the rulings, findings,[3] and conclusions of the Administrative Law Judge and to adopt his recommended Order, as modified herein.

1. The Administrative Law Judge found that Respondent's leadpersons were supervisors, that in mid-December 1978 they had participated in the drafting and circulating of employee petitions seeking a decertification election,[4] and that the supervisory circulation of the employee petitions caused employees to rethink their position with respect to their adherence to their collective-bargaining representative. Consequently, he found that the leadpersons' conduct violated Section 8(a)(1) of the Act. Accordingly, he concluded that Respondent was not privileged to rely upon employee defection from the Union to support its asserted good-faith doubt of the Union's continued majority status, and that by refusing to bargain with the Union on or about January 3, 1979, Respondent violated Section 8(a)(5) and (1).

We agree with the Administrative Law Judge's finding that Respondent's leadpersons are supervisors.[5] However, we note that the leadpersons were part of the bargaining unit covered by the collective-bargaining agreement between Respondent and the Union. We have generally refused to hold an employer responsible for conduct of supervisors who are part of the bargaining unit, absent evidence that the employer encouraged, authorized, or ratified the supervisors' activity, or acted in such a manner as to lead the employees reasonably to believe that they were acting on behalf of management. *Montgomery Ward & Co., Incorporated*, 115 NLRB 645, 647 (1956). The record discloses no evidence that would render Respondent liable for the supervisors' conduct under the principle of *Montgomery Ward*. We therefore shall dismiss that portion of the complaint which alleges that, on December 12, 13, and 14, 1978, Respondent violated Section 8(a)(1) by soliciting employees to withdraw from membership in, and cease activities on behalf of, the Union.[6]

Nonetheless, for the following reasons, we agree with the Administrative Law Judge that Respondent violated Section 8(a)(5) by refusing to bargain with the Union. We have consistently held that a union enjoys a presumption of continuing majority status. In order to rebut that presumption, an employer must either show that the union in fact no longer retains majority support, or that its refusal to bargain was based on a reasonably grounded doubt as to the union's majority status. As to a rea-

[1] Said Decision was unpublished.

[2] We note that G.C. Exh. 7 has been inadvertently filed in Respondent's exhibit file as part of Resp. Exh. 5. Resp. Exh. 5 is a one-page document. Immediately following Resp. Exh. 5 is a two-page document, the first page of which is marked "G.C. 7," and the second page of which is marked "[R. exhibit 5, page 3]." We shall correct this error by entering the above-mentioned two-page document in the General Counsel's exhibit file, designated as G.C. Exh. 7.

[3] The General Counsel has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

[4] A decertification petition was subsequently filed in Case 10-RD-626 on December 28, 1978. After a hearing, the Regional Director, on April 26, 1979, dismissed the petition on the ground that it was tainted by the supervisory involvement of Respondent's leadpersons in soliciting employee signatures in support of the showing of interest. On August 15, 1979, the Board denied the Employer's and the Petitioner's requests for review of the Regional Director's finding that the leadmen were statutory supervisors. Noting the issuance of the instant 8(a)(5) complaint, the Board affirmed the dismissal of the decertification petition without passing on the issue of "taint" which was to be litigated in this proceeding.

[5] Our remand of this proceeding, see fn. 1, *supra*, was to permit the parties to relitigate the status of leadpersons. Following the remand, the parties agreed that no further hearing was necessary, that the right to any further hearing would be waived, and that the Administrative Law Judge would decide the leadperson issue upon consideration of the record made in Case 10-RC-626. Based upon his analysis of the record in Case 10-RC-626, the Administrative Law Judge found that leadpersons were supervisors within the meaning of the Act. We find no merit in Respondent's exception to this finding.

[6] For the same reason, we shall dismiss that portion of the complaint which alleges that Respondent, through leadperson Smith, solicited a relative of an employee to solicit the employee to withdraw from membership in, and cease activities on behalf of, the Union.

sonably grounded doubt, the doubt must be based on objective considerations and must be raised in a context free of unfair labor practices. *Sierra Development Company d/b/a Club Cal-Neva*, 231 NLRB 22, 23 (1977), enfd. 604 F.2d 606 (9th Cir. 1978).

Respondent does not claim that the Union in fact no longer enjoyed majority support, but asserts that it possessed a good-faith doubt, based on objective considerations, as to the Union's continuing majority status. These objective considerations were that only 47 of the 127 employees employed at the time of the representation election remained in its employ as of January 3, 1979; that only 46 employees out of a present total complement of 330 were union members; that there was an annual turnover rate of 60 percent to 65 percent among its employees; and that, prior to January 3, 1979, Works Manager Mathis and his supervisors had been advised by numerous employees that a majority of the employees were dissatisfied with the Union.

We find the factors upon which Respondent based its refusal to bargain insufficient objective considerations upon which to ground a reasonable doubt as to the Union's continuing majority status. With regard to union membership, we have held that a showing that less than a majority of the employees in the unit are members of the union is not the equivalent of showing that the union lacked majority support, because no one can know with certainty how many employees who favor union representation do not become or remain members of the union. *Pioneer Inn Associates, d/b/a Pioneer Inn and Pioneer Inn Casino*, 228 NLRB 1263, 1266 (1977), enfd. 578 F.2d 835 (9th Cir. 1978).

Respecting the rate of turnover,[7] we have held that turnover in itself is not sufficient to establish a reasonable doubt as to a union's majority status, since new employees are presumed to support the union in the same ratio as those they replace. *Club Cal-Neva, supra* at 24. Respondent has not offered any evidence to rebut this presumption.

Finally, regarding the conversations with numerous employees who expressed dissatisfaction with the union representation, Respondent related no specific details concerning the number of employees involved, when these conversations occurred, or what was said. We find Respondent's testimony inadequate to establish that a majority of employees had expressed rejection of the bargaining agent, and therefore insufficient consideration upon which to ground a reasonable doubt as to the Union's majority status. *Gregory's Inc.*, 242 NLRB 644, 648-649 (1979).

Respondent further avers that, in addition to the above-mentioned "objective considerations," it was "subsequently" served copies of the employee petitions, signed by 217 of the 330 employees. Presumably, Respondent would have us hold that, since the circulation of the employee petitions involved no violation of Section 8(a)(1), its good-faith belief that the petitions represented the desires of its employees could serve as an objective consideration upon which to base a reasonably grounded doubt as to the Union's continued majority status, thereby justifying its refusal to bargain.

We find no merit in this argument. First, we note that it is unclear, both from Respondent's briefs and the record, whether Respondent received copies of the employee petitions prior to its refusal to bargain. Certainly, had Respondent received the petitions subsequent to its refusal to bargain, it could not claim that it relied on them as a basis for questioning the Union's majority status.

Further, we do not agree that, based on the circumstances of this case, our dismissal of the 8(a)(1) supervisory solicitation allegation dictates dismissal of the 8(a)(5) allegation. We note that the employee petitions circulated on or about December 12, 13, and 14, 1978—at a time during which Respondent was in the process of remedying an 8(a)(5) violation.[8] Thus, the employee signatures were solicited at a time when Respondent was seeking to remedy the effects of a serious unfair labor practice. And Respondent was admittedly aware of the decertification drive, since it was "observing" the circulation of the petitions to ensure that company rules were not broken.

We have long held, with Supreme Court approval, that a violation of Section 8(a)(5), such as Respondent committed, "disrupts the employees' morale, deters their organizational activities, and discourages their membership in unions." *Franks Bros. Company* v. *N.L.R.B.*, 321 U.S. 702, 704 (1944). The effects of such unlawful conduct are not easily eradicated. Consequently, the purpose of our 60-day posting requirement "is to provide sufficient time to dispel the harmful effects of Respondent's . . . conduct," *Chet Monez Ford*, 241 NLRB 349, 351 (1979), and to ensure that employees are in fact fully informed of the Govenent's protection

[7] Respondent's first factor, i.e., that only 47 of the 127 employees employed at the time of the election remained in its employ as of January 3, 1979, is merely a restatement of the annual turnover factor.

[8] We have been administratively advised that Respondent, on October 19, 1978, posted notices pursuant to an administrative law judge's Decision finding that Respondent had violated Sec. 8(a)(5) by refusing to recognize the Union as the representative of its fabricating employees and apply the then current collective-bargaining agreement to those employees. Eventually, on March 7, 1979, the Board, based on the Union's exceptions, upheld the administrative law judge and ordered an additional monetary remedy. *Robertshaw Controls Co.*, 240 NLRB 1260 (1979).

of their rights. This requirement, particularly given the circumstances of this case, "is not to be taken lightly or whittled down." *Id.* We believe it probable that the unwholesome effects of Respondent's previous unlawful conduct were not expunged at the time of the circulation (of which Respondent was aware) of the employee petitions, and that therefore the signatures obtained were not a reliable barometer of employee sentiment upon which Respondent was privileged to rely as a basis for refusing to bargain with the Union.

In sum, we find that the factors upon which Respondent relied, even considered together, do not constitute a basis for refusing to bargain. Thus, we find that the presumption of continued majority status has not been rebutted either by a showing that the Union, in fact, no longer enjoyed majority support or that Respondent had a sufficient objective basis for reasonably doubting the Union's continued majority status. Accordingly, based on all the circumstances detailed above, we find that Respondent violated Section 8(a)(5) and (1) of the Act.

2. The Administrative Law Judge also found that Respondent's former no-distribution/no-solicitation rules, which were rescinded in March 1979, had not been enforced in the plant for a substantial period of time, and that therefore a remedial order was not necessary. We disagree. We find that, prior to March 1979, Respondent promulgated and maintained rules which prohibited "[s]oliciting or collecting contributions for any purpose on company premises without written management permission," and "[d]istribut[ing] written or printed matter of any description on company premises without written management permission, during working time." Respondent's no-solicitation rule banned protected concerted or union activity at all times on company premises without written management permission, thus banning Section 7 activity on company premises without written management permission during times when employees were not required to be performing work tasks, and was therefore presumptively invalid.[9] Respondent has not demonstrated the necessity for such an overly broad rule.

Concerning the no-distribution rule, we note that its reach was not limited to work areas. *American Cast Iron Pipe Company*, 234 NLRB 1126, 1130–31 (1978). Under these circumstances, we find applicable our recent holding that rules which prohibit employees from engaging in Section 7 activity during "working time," without further clarification, are, like rules prohibiting such activity during "working hours," presumptively invalid. *T.R.W. Bearings Division, a Division of T.R.W., Inc.*, 257 NLRB 442, 443, and fn. 7 (1981). Respondent's no-distribution rule prohibited distribution of any material in nonwork areas without written management permission "during working time," and was therefore presumptively invalid. Respondent has presented no evidence to overcome the presumptive invalidity of such a rule.

Although it is settled that an employer may relieve itself of liability for unlawful conduct by repudiating the conduct, *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), thereby averting the need for a remedial order, we do not believe that the facts of this case warrant dispensing with a remedial order. The Administrative Law Judge found that Respondent made no announcement to the employees of any changes in the rules. Nor does the record reveal any assurances by Respondent to its employees that in the future their employer would not interfere with the exercise of their Section 7 rights. *Id.* at 138–139.

Nor do we agree with the Administrative Law Judge's finding that a remedial order is not warranted because the former rules had not been enforced for a substantial period of time. We have held that the fact that a respondent did not enforce a rule does not insulate it from the proscriptions of the Act, since the mere maintenance of the rule would discourage employees from engaging in otherwise protected activity. *General Thermodynamics*, 253 NLRB 180 (1980); *Paceco, A Division of Fruehauf*, 237 NLRB 399, 401, fn. 11 (1978).

Accordingly, we find that by promulgating and maintaining a rule forbidding solicitation on company premises during times when employees were not required to be performing work tasks, and by promulgating and maintaining a rule forbidding distribution in nonwork areas during times when employees were not required to be performing work tasks, Respondent violated Section 8(a)(1) of the Act. We shall therefore order Respondent to cease and desist from promulgating and maintaining such rules.

3. Finally, following our remand, the Administrative Law Judge again found insubstantial evidence to substantiate an allegation that Respondent unlawfully threatened an employee with discharge for distributing a union leaflet. Contrary to the Administrative Law Judge, as discussed below, we find that Respondent violated Section 8(a)(1) by threatening employee Bennie with discharge for distributing a union leaflet.

At the hearing, evidence adduced showed that, sometime in March 1979, Bennie, while in a work area but before his shift began, handed a union leaf-

[9] *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 621 (1962) (Member Fanning dissenting in part on other grounds).

let to another employee. Shortly thereafter, Assembly Manager Hall called Bennie into his office and orally warned him that the next time he distributed a leaflet he would be discharged.

The Administrative Law Judge held that the record did not definitely establish either the date of the warning incident, or the date when Respondent's new rules were posted. The Administrative Law Judge noted that the distribution occurred in a working area. Relying on these factors, the Administrative Law Judge recommended that the complaint be dismissed insofar as it alleged that the warning to employee Bennie was unlawful.

Contrary to the Administrative Law Judge, we find that the General Counsel presented a *prima facie* case by establishing that Bennie was disciplined for engaging in union activity. Consequently, the burden shifted to Respondent to show "a substantial business justification." *Daylin Inc., Discount Division d/b/a Miller's Discount Dept. Stores*, 198 NLRB 281 (1972), enfd. 496 F.2d 484 (6th Cir. 1974). Therefore, the burden was on Respondent to demonstrate that the discipline occurred subsequent to Respondent's institution of its new, presumably valid rule and not on the General Counsel to demonstrate that the discipline was pursuant to Respondent's prior, invalid rule.[10] Particularly in this situation, where Respondent is the party with access to information which could definitely resolve the dating question, we believe that, by not presenting evidence concerning the precise date the new rule went into effect, Respondent failed to rebut the General Counsel's *prima facie* case and that therefore a finding of an 8(a)(1) violation is warranted.

Accordingly, we find that Respondent violated Section 8(a)(1) by threatening an employee with discharge for distributing a union leaflet.

AMENDED CONCLUSIONS OF LAW

Substitute the following Conclusions of Law for the Administrative Law Judge's Conclusions of Law and Supplemental Conclusions of Law:

1. The Respondent is an employer engaged in commerce within the meaning of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time production and maintenance employees employed by the Respondent at its Ellijay, Georgia, facilities, including electronic equipment technicians and local truckdrivers, but excluding all office clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining.

4. Individuals employed by the Respondent classified as "leadpersons" are, at all times material, supervisors within the meaning of Section 2(11) of the Act.

5. By refusing to bargain with the Union on or about January 3, 1979, and thereafter, Respondent violated Section 8(a)(5) and (1) of the Act.

6. By promulgating and maintaining a rule forbidding solicitation on company premises during times when employees were not required to be performing work tasks, and by promulgating and maintaining a rule forbidding distribution in nonwork areas during times when employees were not required to be performing work tasks, Respondent violated Section 8(a)(1) of the Act.

7. By threatening an employee with discharge for distributing a union leaflet, Respondent violated Section 8(a)(1) of the Act.

8. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Robertshaw Controls Company, Ellijay, Georgia, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(a):

"(a) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act, by promulgating and maintaining a rule forbidding solicitation on company premises during times when employees were not required to be performing work tasks, by promulgating and maintaining a rule forbidding distribution in nonwork areas during times when employees were not required to be performing work tasks, and by threatening an employee with discharge for distributing a union leaflet."

2. Substitute the attached notice for that of the Administrative Law Judge.

MEMBER JENKINS, concurring in part and dissenting in part:

I agree with all my colleagues' findings except their dismissal of the allegation that Respondent violated Section 8(a)(1) of the Act by soliciting em-

[10] Alternatively, Respondent could have made "an affirmative showing of impairment of production." *Id.* However, Respondent introduced no evidence establishing that the distribution in question interfered in any way with production.

ployees to withdraw their memberships in, and cease activities on behalf of, the Union. Since I would find, in agreement with the Administrative Law Judge, that Respondent so violated Section 8(a)(1), I would further find that the employee petitions relied upon by Respondent as a basis for its alleged reasonable doubt of the Union's continued majority status were tainted by supervisory participation and therefore were unreliable as an indicator of employee sentiment. Thus, I join my colleagues in finding that Respondent also violated Section 8(a)(5) of the Act by refusing to bargain with the Union.[11]

Respondent employs approximately 19 "leadpersons" at its two plants. The record reflects that these leadpersons, who were formerly called "working supervisors," possess the independent authority to assign work, transfer employees among jobs and departments, grant time off, excuse absences, verify and correct employees' production cards, administer discipline, assign overtime, correct timecards, and fill out personnel requisition forms when they determine a need for additional employees in their department. Additionally, leadpersons review computer printouts reflecting the production efforts of individual employees, substitute for stipulated supervisors when they are on vacation or absent due to illness, and have individual desks and telephones which production employees are not permitted to use. Finally, new employees are informed that they will be "working for" their leadperson and that they should do as their leadperson instructs. Based upon the foregoing, the Administrative Law Judge, and the Regional Director for Region 10 in Case 10–RD–626, found that these leadpersons were supervisors within the meaning of Section 2(11) of the Act. I agree.[12]

The Administrative Law Judge found that at least five of the supervisory leadpersons were "instrumental" in the drafting and circulating of the employee petitions referred to above. One such leadperson, Richard Sanford, testified that he personally asked about 15 to 20 employees to sign said petitions, and a second, Ronnie Smith, testified that he engaged in similar conduct and secured the signatures of approximately 34 to 40 employees. In addition, Respondent conceded at the hearing that it was aware that the leadpersons were circulating the petitions, and took no action to stop their participation. Indeed, Respondent's works manager, Roy Mathis, who is responsible for the total day-to-day operation of both of Respondent's plants, testified that he instructed his supervisors to observe the circulation of the petition to be certain that the solicitation of signatures did not occur on company time.

In finding that the circulation of, and solicitation of signatures for, the petition by leadpersons violated Section 8(a)(1) of the Act, the Administrative Law Judge stated that "it would seem that the concerted and concentrated circulation of such document within a few days, by representatives of management, caused the employees to rethink their position with respect to their adherence to their collective-bargaining representative, and thus to constitute interference, restraint, and coercion with respect to their right under Section 7 to make that decision without the intervention of managerial pressure." My colleagues, however, reverse the Administrative Law Judge and find that, although the leadpersons are supervisors, the record discloses no evidence that would render Respondent liable for the supervisors' conduct under the principles of *Montgomery Ward & Co., Incorporated*, 115 NLRB 645 (1956). I do not agree.

It is well settled that antiunion solicitation by a supervisor and/or agent of management constitutes an infringement on employees' Section 7 rights, and is therefore violative of Section 8(a)(1) of the Act. *Nassau Glass Corporation*, 222 NLRB 792 (1976); *Suburban Homes Corporation*, 173 NLRB 497 (1968). This principle also holds true where the supervisor or agent occupies a position in the bargaining unit if, as it appears in the instant case, the duties which Respondent assigned the supervisor or agent cause the employees to regard that person as an arm of management. *Montgomery Ward & Co., Incorporated, supra*. Thus, my colleagues' decision must implicitly stand for the proposition that a supervisor who possesses the authority to, *inter alia*, assign work, discipline employees, assign overtime, and grant time off, and who further substitutes for stipulated supervisors when they are on vacation or absent due to illness, does not stand as an arm of management in the eyes of rank-and-file employees. I regard such a proposition as untenable, and would affirm the Administrative Law Judge's contrary finding.

Moreover, and as was the case in *Hydro Conduit Corporation*, 254 NLRB 433 (1981), in which I dissented, Respondent's knowledge of the leadpersons' "supervisory-type" functions must have alerted it to the likelihood that employees would view the petition as company-instigated. Respondent admittedly knew at the time the petition was being cir-

[11] I further agree with my colleagues that, in any event, Respondent may not rely on the employee petitions as a basis for its refusal to bargain, since at the time the employees' signatures were solicited Respondent had not remedied its earlier conduct.

[12] Notwithstanding the seemingly apparent supervisory indicia set forth above, the leadpersons have been included in the collective-bargaining unit by agreement of the Union and Respondent, despite the fact that the Union challenged those ballots cast by leadpersons in the representation case which resulted in the Union's certification.

culated that at least some of its prime movers were supervisory leadpersons, yet took no action to cease such participation. In my view, that failure to act served to ratify the leadpersons' activities. I would find that such ratification serves as a second ground to charge Respondent with responsibility for the subject antiunion solicitation.

I thus would find that, under the circumstances present herein, the solicitation of employee signatures on an antiunion petition by supervisory personnel violated Section 8(a)(1) of the Act, and would adopt the Administrative Law Judge's finding to that effect.[13]

[13] Similarly, and for like reasons, I also would adopt the Administrative Law Judge's finding that Respondent violated Sec. 8(a)(1) of the Act when it, through leadperson Smith, solicited a relative of an employee to solicit the employee to withdraw from membership in, and cease activities on behalf of, the Union.

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

WE WILL NOT refuse to bargain in good faith with International Union of Electrical Radio and Machine Workers, AFL-CIO-CLC, and its Local 194, as the certified collective-bargaining representative of the employees in the following described unit:

All full-time and regular part-time production and maintenance employees employed by us at our Ellijay, Georgia, facilities, including electronic equipment technicians and local truckdrivers, but excluding all office clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the National Labor Relations Act:

By promulgating and maintaining a rule forbidding solicitation on company premises during times when employees were not required to be performing work tasks;

By promulgating and maintaining a rule forbidding distribution in nonwork areas during times when employees were not required to be performing work task;

By threatening an employee with discharge for distributing a union leaflet.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them under Section 7 of the National Labor Relations Act.

WE WILL bargain in good faith with the aforesaid Union, upon its request, as the exclusive representative of the employees in the above-described unit, and embody in a signed agreement any understanding reached.

ROBERTSHAW CONTROLS COMPANY

DECISION

STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: This case was heard in Ellijay, Georgia, on October 3–4, 1979, on due notice. The principal issue presented for decision is whether Robertshaw Controls Company (herein the Respondent) violated Section 8(a)(5) of the National Labor Relations Act, as amended (herein the Act), on or about January 3, 1979, when it admittedly refused to bargain with the Charging Union. Also involved are questions of whether Respondent, through acts and conduct of its agents and supervisors, interfered with, restrained, and coerced employees in the exercise of Section 7 rights, in violation of Section 8(a)(1) of the Act.[1]

After the close of the hearing, and within the time allowed, counsel for Respondent filed a written brief, which has been duly considered.

Upon the entire record including arguments of counsel, and my observation of the demeanor of the witnesses,[2] I make the following:

FINDINGS AND CONCLUSIONS

I. THE ALLEGED UNFAIR LABOR PRACTICES[3]

A. *The 8(a)(5) Issue*

Pursuant to an election conducted by the Board in September 1975, the above-named International Union

[1] The original charge was filed on March 26, 1979; the complaint and notice of hearing issued on May 23, 1979.

[2] Cf. *Bishop and Malco, Inc., d/b/a Walker's*, 159 NLRB 1159, 1161 (1966).

[3] There is no issue as to the Board's jurisdiction or the status of the Charging Union as a labor organization. The complaint alleges sufficient facts respecting the interstate operations of Respondent, which are admitted by answer, upon which I may, and do hereby, find that Respondent is engaged in commerce within the meaning of Sec. 2(6) and (7) of the Act. I also note that the Board recently asserted jurisdiction over Respondent in Case 10-CA-13361, reported at 240 NLRB 1260 (1979).

The complaint alleges that the International Union, named above, and its Local 194 are "each a labor organization within the meaning of Section 2(5) of the Act." The answer of Respondent admits that "the International is a labor organization within the meaning of Section 2(5) of the Act, but denies any and all other allegations." At the hearing, the issue was raised as to the "labor organization status of Local 194." When asked whether that issue could be resolved, counsel for Respondent responded:

MR. ALLISON: Consider it resolved, Your Honor.

Continued

was certified as the exclusive collective-bargaining representative of all full-time and regular part-time production and maintenance employees employed by Respondent at its Ellijay, Georgia, facility, including electronic equipment technicians and local truckdrivers, but excluding all office clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act.[4] On or about March 8, 1976, Respondent and the Union executed a collective-bargaining agreement effective from March 8, 1976, to March 8, 1979, covering the above-described unit.

The record reflects that, during December 1978, there was a movement among some of the employees at the plant to decertify the Union, and that, on 1 or 2 days during the middle of December, petitions for that purpose were circulated among the employees seeking their signatures and support for decertification. The aforesaid petitions were drafted and circulated, for the most part, by individuals employed by Respondent as "leadpersons."[5]

The record reflects that the decertification petition was filed at Region 10 of the National Labor Relations Board in Atlanta, Georgia, on December 28, 1978 (Case 10-RD-626). A hearing on said petition was held on January 11-12, 1979, and the Regional Director issued his decision on April 26, 1979. In his decision, the Regional Director recited that:

> The only issue involved herein is whether leadpersons employed by the Employer are supervisors within the meaning of Section 2(11) of the Act and should, therefore, be excluded from the above unit. The Petitioner and the Employer, contrary to the Intervenor, would include the leadpersons in the unit.[6]

After a full discussion of the evidence, considered in the light of Board precedent, the Regional Director found that the leadpersons are supervisors within the meaning of the above section of the Act. He further found, following an administrative investigation conducted pursuant to the Intervenor's collateral attack on the Petitioner's showing of interest, that:

> . . . leadpersons, to a significant extent, engaged in the solicitation of employee signatures in support of Petitioner's showing of interest. The supervisory participation herein is such that I find the petition to be tainted so that it may not reflect the true desires of the solicited employees.[7]

The Regional Director, therefore, dismissed the petition.

Thereafter, both the Petitioner and Employer requested the National Labor Relations Board to review the Regional Director's decision, and on August 15, 1979, the Board issued the following ruling:

> RE ROBERTSHAW CONTROLS CO. 10-RD-625 EMPLOYER'S AND PETITIONER'S REQUESTS FOR REVIEW OF THE REGIONAL DIRECTOR'S FINDING THAT THE LEADMEN ARE STATUTORY [SIC] SUPERVISORS ARE HEREBY DENIED AS THEY RAISE NO SUBSTANTIAL ISSUES WARRANTING REVIEW. HOWEVER, AS A COMPLAINT HAS ISSUED IN CASE 10-CA-14508, ALLEGING AN UNLAWFUL REFUSAL TO BARGAIN BY EMPLOYER, THE INSTANT PETITION CAN NOT NOW RAISE A VALID QUESTION CONCERNING REPRESENTATION (SEE BIG THREE INDUSTRIES, 201 NLRB 197) AND FOR THAT REASON WE AFFIRM THE DISMISSAL OF THE INSTANT PETITION WITHOUT PASSING ON THE ISSUE OF TAINT WHICH WILL BE LITIGATED IN THE AFORESAID COMPLAINT CASE. THIS PETITION IS SUBJECT TO REINSTATEMENT, IF APPROPRIATE, UPON DISPOSITION OF THE COMPLAINT. BY DIRECTION OF THE BOARD (MEMBER PENELLO JOINS IN THE DISMISSAL OF THE PETITION WITHOUT PASSING UPON THE STATUS OF THE LEADMEN).
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> DATED AUG. 15, 1979
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> ROBERT VOLGER ACT EXEC SECY NLRB WSH DC
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Meanwhile, on or about January 3, 1979, the Union requested Respondent to bargain collectively, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment in the unit described above. On or about the same day, Respondent admittedly refused to bargain with the Union on the ground that, as stated in Respondent's answer to the complaint herein, "there was no obligation on the part of Respondent to bargain with the union in that objective considerations and other factors showed that the union no longer represented a majority of Respondent's employees and Respondent could therefore not lawfully bargain with the union." Respondent further averred that it had been notified by the Regional Director that the aforesaid RD petition had been filed, and, if the Regional Director had reasonable cause to believe that a question concerning representation existed, a hearing would be scheduled. Since a hearing was conducted, as aforesaid, Respondent believed that the Regional Director's preliminary investigation had disclosed that there was a question concerning representation existing; it therefore "advised the union that since there was a question con-

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JUDGE COHN: All right. You're willing to stipulate that Local 194 is a labor organization?

MR. ALLISON: I would like to amend my answer.

JUDGE COHN: All right. We can do that later.

Although the answer of Respondent was never officially amended to comport with the foregoing colloquy, it is my interpretation that Respondent was willing to stipulate as to the labor organization status of Local 194, there being nothing in the record to the contrary. Accordingly, I so find. The International Union and its Local 194 will hereinafter be collectively referred to as the Union.

[4] This unit was later clarified on April 29, 1979, in Case 10-UC-70, to include therein a classification of "electronic equipment technicians."

[5] The petitions (all identical) were addressed to the Regional Director for Region 10 of the National Labor Relations Board, and recited as follows:

> We, the employees of Robertshaw Controls Co., Ellijay, Ga., feel that under the present union the majority is not truly represented, therefore, as employees of Robertshaw Controls Co. we request the Labor Relations Board, order a vote to determine the true majority for or against the union.

[6] See G.C. Exh. 2, App. D.

[7] *Ibid.*

cerning representation it would not be proper that [Respondent] engage in negotiations for a new contract."[8]

At the hearing herein, Respondent contended that it could not be held responsible for the circulation of the aforesaid petitions by the "leadpersons" since they were not, in fact, supervisors within the meaning of the Act. Respondent then sought to relitigate their status as supervisors. Upon objection by the General Counsel, I, relying on Section 102.67(f) of the Board's Rules and Regulations,[9] as well as the Board's telegraphic confirmation of the Regional Director's decision, aforesaid, denied Respondent's request, and ruled that evidence would be taken only with respect to the issue of taint.[10]

The evidence is substantial that several of the leadmen were instrumental in the drafting and circulation of the aforesaid petition among the employees in the plant during off-duty hours. Thus Richard Sanford, a leadperson, testified that he along with Sue Thurman, John Cantrell, Brenda Hardy, and others circulated the petition in the plant, and he personally talked to approximately 15 to 20 employees and asked if they would sign it. Ronnie Smith, a leadperson in the maintenance department, testified that he engaged in similar conduct and secured the signatures of approximately 34 to 40 employees.[11]

Based on the foregoing, it cannot be denied that agents of Respondent were substantially involved in the solicitation of employees to sign the decertification petitions, and therefore Respondent cannot rely on such petitions to support "its assertion that it had valid grounds for doubting the Union's majority status."[12] Although there is no evidence that the leadpersons, in connection with their circulation of the petitions, vocally threatened or coerced employees into signing the petitions, it would seem that the concerted and concentrated circulation of such documents within a few days, by representatives of management, caused the employees to rethink their position with respect to their adherence to their collective-bargaining representative, and thus to constitute interference, restraint, and coercion with respect to their right under Section 7 to make that decision without the intervention of managerial pressure. I therefore find such conduct to constitute a violation of Section 8(a)(1) of the Act.[13] Accordingly, Respondent was not privileged to rely on such defection as supportive of its asserted good-faith doubt of the Union's majority status in January.[14] I therefore find that its refusal, on or about January 3, 1979, to bargain with the Union on the latter's request constituted a violation of Section 8(a)(5) of the Act.[15]

B. *Other Alleged Acts of Interference, Restraint, and Coercion*

1. The complaint alleges that on or about December 22, 1978, leadperson Jace Smith, in a telephone conversation, solicited a relative of an employee to solicit its employees to withdraw from membership in, and cease activities on behalf of, the Union. In support of such allegation Eweil Hice testified that at the time she had a daughter who worked at the plant named Margie Hagen, who was supervised by Jace Smith; that, on one occasion when she was ill and did not go to work, he telephoned the plant and spoke to Smith. During the conversation Smith asked Hice to attempt to persuade Hagen to withdraw from the Union, since the Union "was not doing anything except causing confusion and trouble, and [that] there had been several other companies that started to

[8] See Respondent's answer at p. 4. On or about March 12, 1979, Respondent filed its own petition (Case 10-RM-687) which was apparently dismissed because of the issuance of the complaint herein.

[9] This section provides as follows:

> The parties may, at any time, waive their right to request review. Failure to request review shall preclude such parties from relitigating, in any related subsequent unfair labor practice proceeding, any issue which was, or could have been, raised in the representation proceeding. Denial of a request for review shall constitute an affirmance of the regional director's action which shall also preclude relitigating any such issues in any related subsequent unfair labor practice proceeding.

[10] During the course of the hearing, Respondent made a request for special permission to appeal the foregoing ruling, which was denied by the Board on October 30, 1979.

[11] Respondent contends that Ronnie Smith's participation should not be considered because, although he was *classified* as a leadperson in maintenance prior to the circulation of the petitions, he was *announced* as a leadperson to the employees until subsequently—at not a Christmas party. I deem it unnecessary to resolve this particular point since there is substantial evidence elsewhere in the record that known leadpersons were instrumental in circulating the petition.

[12] *Dayton Motels, Inc. d/b/a Holiday Inn of Dayton*, 192 NLRB 674 (1971), enfd. 525 F.2d 476 (6th Cir. 1975). As the Administrative Law Judge in *Alvin J. Bart and Co. Inc.*, 236 NLRB 242, 252 (1978), put it:

> Bart was fully apprised that the petition [requesting Respondent not to recognize the Union] and its contents did not necessarily reflect the spontaneous and uncoerced desires of his unit employees regarding collective representation, but was fostered and nurtured by a management agent.

[13] Cf. *Movie Star, Inc., et al.*, 145 NLRB 319, 335 (1963), enfd. in pertinent part 361 F.2d 346 (5th Cir. 1966).

[14] See *Celanese Corporation of America*, 95 NLRB 664, 673 (1951). In view of this finding, I do not reach the additional argument of the General Counsel that Respondent was not privileged to refuse to bargain based on an asserted existence of a question concerning representation in view of pending litigation involving this unit. See *Big Three Industries*, 201 NLRB 197 (1973). That is to say, the facts show that on September 28, 1978, the Administrative Law Judge issued his Decision in Case 10-CA-13361, involving this Respondent, finding that Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to recognize the Union (and to apply the terms of the collective-bargaining agreement) to a nearby facility of Respondent. That case was before the Board on exceptions of the Union on January 3, 1979, the date of the refusal to bargain herein. The Board, on March 7, 1979, issued its decision upholding the Decision of the Administrative Law Judge and ordering an additional monetary remedy (240 NLRB 1268). Under the foregoing history it is apparent that the litigation was extant on January 3, 1979, due to the Union's—not Respondent's exceptions. For aught the record shows, Respondent was able and willing to comply with the Administrative Law Judge's Decision. Under these circumstances it is doubtful that the *Big Three* doctrine would be applicable here.

[15] In its brief (p. 10), Respondent argues that, even if it be assumed that the leadpersons are supervisors, their participation in the circulation of the petitions was not sufficient to taint such petitions or "preclude the Respondent's reliance on such petitions as part of its objective considerations (relying upon *N.L.R.B.* v. *Alvin J. Bart and Company, Inc.*, 598 F.2d 1267 (C.A. 2, 1979). However, the facts in that case clearly distinguish it from the case at bar. Thus, unlike the present situation, the court pointed to the fact that no company officer knew of the supervisor's activities [in circulating the petition] prior to his presentation of such petition to the management, and, more importantly, the court found that there was no evidence that [the supervisor] coerced or *in any way persuaded the employees to sign the petition*." (Emphasis supplied.) This is, of course, contrary to the evidence here. See, e.g., testimony of Richard Sanford that he personally asked 15 to 20 employees to sign.

locate [in Ellijay] but had moved on [because of] the Union."[16]

I find the foregoing solicitation to constitute a violation of Section 8(a)(1) of the Act even though there is no direct testimony that the solicitation was ever communicated by Hice to Hagen. It is certainly a reasonable inference—which I may draw—that the father communicated to her the contents of the telephone conversation which she requested him to make.

2. The complaint alleges that on or about November 1, 1978, Supervisor George Hall orally prohibited Respondent's employees from engaging in activities on behalf of the Union unless they obtained the prior approval of Respondent. The allegation appears to have arisen as a consequence of two employees advising Union Steward Juanita Stover of an alleged practice of their supervisor of wrongfully assigning overtime work. Stover testified that at her next break she talked to the employees' supervisor, worked out the problem, and started back to her work station; that Supervisor Jace Smith stopped her and asked her where she had been; that she responded that she had been taking care of a union problem; and that while they were talking the buzzer sounded indicating that employees had 2 or 3 minutes to return to the work area. Later that afternoon, Hall approached Stover and told her that Smith had reported to him that she had been taking care of union problems on company time. Stover inquired if she "was getting a warning for it, and he told me no, but the next time to get permission first."[17] Stover did not receive a warning or any other discipline as a consequence of the incident.[18]

There does not appear to be substantial evidence of a violation of the Act in this incident. At most, there appears to be simply a question of whether or not the union steward was engaging in union business on company time for a matter of a few minutes, and that supervision simply reminded her to refrain therefrom without issuance of any form of discipline. I am of the opinion, and therefore find, that the incident does not warrant the finding of a violation or the issuance of a remedial order. I shall therefore recommend that this allegation of the complaint be dismissed.

3. The complaint alleges that Respondent, since on or about September 27, 1978, has promulgated and at all times thereafter maintained and enforced the following rule, prohibiting:

> Distribution [of] written or printed matter of any description on company premises without written management permission, during working time.[19]

The record reflects that the foregoing rules were, among others, posted by Respondent when it first began operations in Ellijay years ago.[20] However, apparently as a consequence of a charge of unfair labor practice having been filed with the NLRB, Respondent, in March 1979, rescinded the foregoing rules and replaced them with the following:

> 17. No solicitations of any kind, including solicitations for memberships or subscriptions, will be permitted at any time by employees who are supposed to be working or in such a way as to interfere with the work of other employees who are supposed to be working. Anyone who does so and thereby neglects his work or interferes with the work of others will be subject to disciplinary action.
>
> * * * * *
>
> 20. No distribution of any kind, including circulars or other printed material, shall be permitted in work areas of the plant at any time.

Although there was apparently no announcement by management to the employees of the foregoing changes in the posted rules of the plant, I find no basis on which to discredit the testimony of Respondent's manager that the changes occurred as testified. Accordingly, I find that the former rules have not been extant or enforced in the plant for a substantial period of time, and a remedial order in the circumstances is not warranted.

4. The complaint, as amended at the hearing, alleges that on or about March 6, 1979, in and about the vicinity of the plant, Respondent threatened its employees with discharge if they joined or engaged in activities on behalf of the Union. The evidence in support of this allegation pertains to employee Donald Bennie who worked on the second shift at the plant. He testified that he was at his workplace prior to the commencement of the second shift when a female employee, Shirley Burge, came by and he handed her a union leaflet, and told her that he would like to have her join the Union. Burge apparently reported the incident to Respondent's manager, George Hall, telling him that Bennie handed her a union leaflet during working time while she was at her work station.[21] Hall called Bennie into his office a short time later and advised that he could not hand out union leaflets during working time, and issued him a warning for doing it.

It is evident that in assessing the merits of the alleged violation, a critical factor is when it occurred. It is apparent that Hall believed, in accordance with the report given him by Burge, that the incident occurred "after the buzzer sounded," i.e., after working hours commenced. Bennie testified that "it was about 4:30 when I was handing them [the leaflets] out to that woman."[22]

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[16] Testimony of Hice. Although Smith did not recall having any such conversation with Hice, the latter impressed me as being an honest and trustworthy witness, and I cannot believe that he fabricated such conversation out of whole cloth. Accordingly, I credit Hice.

[17] Testimony of Stover.

[18] Hall testified that Smith reported to him that Stover was late getting back to her job, and that she had told Smith that she had been taking care of union business. Accordingly, he (Hall) merely advised Stover that she was required to attend to union business on breaktime, and, as indicated, did not give her a warning or other disciplinary action.

[19] The complaint also alleges that, since or about the same date, Respondent promulgated and at all times thereafter maintained the following rule, prohibiting:

> Soliciting or collecting contributions for any purpose on company premises without written management permission.

[20] See rules 17 and 20 in G.C. Exh. 3.

[21] Testimony of Hall; Burge was not called as a witness.

[22] Apparently, 4:30 p.m. was the commencement time for the second shift.

Under all circumstances, I am of the view that there is insubstantial evidence to warrant the finding of a violation since it is not firmly established that the incident did not occur during worktime. I shall therefore recommend the complaint, to that extent, be dismissed.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. All full-time and regular part-time production and maintenance employees employed by the Respondent at its Ellijay, Georgia, facility, including electronic equipment technicians and local truckdrivers, but excluding all office clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act, constitute an appropriate unit for the purposes of collective bargaining.
4. By refusing to bargain with the Union on or about January 3, 1979, and thereafter, Respondent violated Section 8(a)(5) and (1) of the Act.
5. By soliciting and encouraging employees to sign petitions to decertify the Union as their exclusive collective-bargaining representative, Respondent has violated Section 8(a)(1) of the Act.
6. By soliciting employees to withdraw from the Union, Respondent has violated Section 8(a)(1) of the Act.
7. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, it will be recommended that Respondent cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent refused to bargain in good faith with the Union in violation of Section 8(a)(5) and (1) of the Act, it shall be ordered to cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit concerning wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:

ORDER[23]

The Respondent, Robertshaw Controls Company, Ellijay, Georgia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them under Section 7 of the Act, by encouraging and soliciting employees to sign petitions to decertify the Union as their collective-bargaining representative, and by soliciting employees to withdraw from the Union.

(b) Refusing to bargain with the Union, upon request.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which is found will effectuate the policies of the Act:

(a) Upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit described above with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at its Ellijay, Georgia, facility copies of the attached notice marked "Appendix."[24] Copies of said notice, on forms provided by the Regional Director for Region 10, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and shall be maintained by Respondent for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director for Region 10, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

IT IS FURTHER RECOMMENDED that the allegations of the complaint be dismissed in all respects other than those found to have been sustained in the above findings and conclusions.

[23] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[24] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

SUPPLEMENTAL DECISION

STATEMENT OF THE CASE

ROBERT COHN, Administrative Law Judge: On February 29, 1980, I issued an original Decision in this proceeding finding, *inter alia*, that Respondent, on or about January 3, 1979, violated Section 8(a)(5) and (1) of the National Labor Relations Act, as amended (herein the Act), by refusing to bargain with the Charging Union. As explicated in that Decision, Respondent admittedly refused to meet and bargain with the Charging Union based on its assertion that the said Union no longer represented a majority of Respondent's employees in an appropriate unit. Respondent's position was bottomed primarily on the fact that a decertification petition had been filed (Case 10-RD-626) which assertedly raised a ques-

tion concerning representation. However, the decision of the Regional Director in the RD case revealed that the principal issue in that case involved the question of whether leadpersons employed by Respondent were supervisors within the meaning of Section 2(11) of the Act. Finding that they were supervisors, the Regional Director went on to find and conclude, pursuant to an administrative investigation, that such leadpersons, "to a significant extent, engaged in the solicitation of employee signatures in support of Petitioner's showing of interest. The supervisory participation herein is such that I find the petition to be tainted so that it may not reflect the true desires of the solicited employees." He therefore dismissed the petition in Case 10–RD–626.

Thereafter, both the Petitioner and Respondent in the RD case requested the National Labor Relations Board to review the Regional Director's decision. The Board granted such request, and, on August 15, 1979, the Board issued a ruling upholding the finding of the Regional Director that the leadpersons are statutory supervisors, and noted that the issue of taint respecting the petition in that case would be litigated in the instant proceeding.

At the hearing in the instant proceeding, Respondent sought to relitigate the issue of the supervisory status of the leadpersons, which was denied by me for the reasons stated in my Decision.[1]

Pursuant to exceptions to the original Decision filed by Respondent and the General Counsel, the Board, on June 4, 1980, issued its "Decision and Order Remanding Proceeding to Administrative Law Judge" stating, *inter alia*, that the Board "has concluded that Respondent should be permitted to relitigate the status of 'leadpersons' as supervisors within the meaning of the Act . . . [and] . . . we shall therefore remand this case to the Administrative Law Judge so that he may consider this issue both on the record made in Case 10–RD–626 and in light of any additional evidence that he finds material to a proper resolution of the issue."[2] The Board directed that I "shall take such action as is required in light of our decision that Respondent may relitigate the status of 'leadpersons' as supervisors within the meaning of the Act."

Upon contact with the parties following the remand, it was agreed that (1) no further hearing in the instant proceeding would be required, and that the right to any further hearing would be waived; and (2) I would decide the issue assigned to me upon consideration of the record made in the RD case in the light of supplemental briefs to be filed by the parties on or before August 22, 1980. Such briefs were filed in due course, and have been carefully considered by me.[3]

Upon the entire record, including arguments of counsel, I hereby make the following:

[1] During the course of the hearing, Respondent made a request for special permission to appeal that ruling, which was denied by the Board on October 30, 1979.

[2] The Board cited the case of *Serv-U-Stores, Inc.*, 234 NLRB 1143 (1978).

[3] In its brief, Respondent moved the admission of its Exhs. 2 and 4 into evidence since they were originally rejected on the ground that they bore on the nonrelitigable supervisory issue. In view of the remand, Respondent's motion is hereby granted.

FINDINGS OF FACT

I. SUPERVISORY STATUS OF THE "LEADPERSONS"

As previously noted, a hearing was held in Case 10–RD–626 in which Respondent, the Charging Union, and petitioning employees fully participated. The principal issue at the hearing was the supervisory status of the approximately 19 leadpersons employed by Respondent at its 2 plants in Ellijay, Georgia. Substantial evidence was adduced respecting their work functions, duties, and responsibilities, and of the relationship among the leadpersons and the rank-and-file employees on the one hand, and with the acknowledged supervisors on the other.[4] Pursuant to the instructions of the Board, and the agreement of the parties, I have carefully reviewed the record in that case and find there is substantial evidence to support the findings and conclusions of the Regional Director made therein insofar as his decision describes the functions, duties, and responsibilities of the leadpersons.[5] Accordingly, contrary to the contentions of Respondent, I conclude, and therefore find, as did the Regional Director under the authorities cited by him, that the leadpersons are supervisors within the meaning of the Act.[6]

II. THE ALLEGED 8(A)(1) VIOLATION

In its order of remand, the Board, in footnote 2, of said order, directed as follows:

> The Administrative Law Judge dismissed that portion of the complaint charging that Respondent violated 8(a)(1) by threatening an employee with discharge for distributing a union leaflet. As part of

[4] The record establishes that Respondent employed approximately 14 admitted supervisors in the 2 plants, and that there were approximately 330 rank-and-file employees employed by Respondent in the 2 plants. Both plants worked two shifts.

[5] It would seem unduly repetitious and redundant to recite and recapitulate these findings herein. Accordingly, I attach hereto, as an appendix, the Regional Director's decision which I adopt to the extent that it describes the aforesaid functions, duties, and responsibilities of the leadpersons, and makes findings as to their supervisory status.

[6] In its brief, Respondent relies heavily on *UTD Corporation (Union-Card Division)*, 165 NLRB 346 (1967), contending that the Board in that case found leadmen not to be supervisors even though they "possessed considerably more authority than the leadpersons in the instant matter." I cannot agree with that contention since, for example, testimony in the instant matter records that one employee was granted permission to leave the plant on two occasions by a leadperson without the latter's checking with a supervisor; another testified that a leadperson "got on to her," i.e., warned her, about her production and about her talking while on the job and daily advised her as to her job duties, and changed her from one machine to another. Moreover, the Board, in *Screwmatic, Inc.*, 218 NLRB 1373 (1975), distinguished the *UTD* case by observing that "Although many of the facts of that case appear to be similar to those in the instant case, we note that the employee-supervisor ratio in that case was 16 to 1 whereas in the instant case it is 40 to 1." 218 NLRB at 1374, fn. 4. The ratio in the instant case would be 24 to 1 if leadpersons are not found to be supervisors. (Contrary to *Stationers Corporation*, 99 NLRB 240 (1952), relied on by Respondent, the nature of the work herein would seem to require more constant supervision than that of the warehouse employees in that case.) Finally, as the Board noted in *Screwmatic*, there is substantial evidence in the record that employees looked to leadpersons as their supervisors in the day-to-day performance of their duties.

In addition to those cases cited by the Regional Director, see also *Porta Systems Corporation*, 238 NLRB 192 (1978), enfd. 625 F.2d 399 (2d Cir. 1980), where the Board under similar circumstances, found the leadpersons to be supervisors within the meaning of Sec. 2(11) of the Act.

this remand, we instruct the Administrative Law Judge to make findings of fact and credibility resolutions pertaining to the exact date on which Respondent's new no-solicitation/no-distribution rules were implemented, whether the distribution occurred during working or non-working time, and whether the distribution took place in a work or non-work area of the plant. See *Daylin, Inc., Discount Division*, 198 NLRB 281 (1972).

As set forth in my original Decision, the record evidence in this case does not establish the specific date on which Respondent's new no-solicitation/no-distribution rules were made effective. The most that the evidence shows is that such rules were posted sometime in March 1979. As stated in my original decision, "I find no basis upon which to discredit the testimony of the Respondent's manager that the changes occurred as testified." Moreover, the exact date upon which the incident under review occurred is likewise vague and indefinite. It is true that the complaint alleges that the incident occurred "on or about March 6, 1979," but Bennie (the employee involved) did not, by his testimony, definitely establish such date. Rather, the date was suggested to him by counsel on direct examination as follows:

Q. Mr. Bennie, do you recall a meeting that you had with George Hall around March the 6th, 1979?

A. Yes, I do.

Q. And, what time was that meeting held?

A. It was about near about 4:30—about 25 to 5:00.

And on cross-examination as follows:

Q. And, you stated that on this particular day, did you say, March—what day was it?

A. I couldn't be sure on the date.

Q. March 6th; you were at your work station, correct?

A. Yes, sir.

It is apparent from the foregoing that the record evidence does not definitely establish either the date of the alleged incident, or the date when Respondent's new no-solicitation/no-distribution rules were posted. Accordingly, in my view, there is insubstantial evidence on the record to establish that the incident occurred prior to the change in the rules. Therefore, a violation may not be predicated upon the theory that the warning issued by Hall to Bennie was pursuant to an illegal no-solicitation/no-distribution rule. Moreover, the distribution admittedly occurred in a working area.[7]

Based on all of the foregoing, I adhere to the finding made in the original Decision that there is insubstantial evidence in the record to substantiate the allegation of the complaint in this regard, and recommend that the complaint, to that extent, be dismissed.

[7] Pursuant to the order of remand, I find, based on Bennie's uncontradicted testimony, that the solicitation took place during nonworking time; i.e., before work started that afternoon.

CONCLUSIONS

In view of the foregoing findings of fact, it is recommended that:

1. The Conclusions of Law of the original Decision be amended to read as follows: Insert as paragraph 5 thereof the following:

Individuals employed by the Respondent classified as "leadpersons" are, at all times material, supervisors within the meaning of Section 2(11) of the Act.

2. Renumber the existing paragraphs 5, 6, and 7 to 6, 7, and 8.

Except to the extent herein modified, the remaining findings of fact, conclusions of law, and recommendations stand as set forth in the original Decision.

APPENDIX
DECISION AND ORDER

Upon a petition[1] duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Stephen D. Hise, a Hearing Officer of the National Labor Relations Board.

Pursuant to Section 3(b) of the Act, the Board has delegated its authority in connection with this case to the undersigned.

Upon the entire record[2] in this case the undersigned finds:

1. The Hearing Officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.[3]

2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction herein.[4]

[1] The Intervenor [International Union of Electrical Radio and Machine Workers, AFL-CIO-CLC] participated in the hearing based on its certification on October 6, 1975, in Case 10-RC-10415 as the exclusive bargaining representative of all the employees in the unit encompassed by the petition herein. The name of the Intervenor is as shown on the aforementioned certification.

[2] Briefs were submitted by all parties and were duly considered. The Employer's Motion to Strike Brief of Intervenor based upon untimely filing is hereby denied. Intervenor's brief was timely received by this office on January 24, 1979.

[3] The Intervenor moved to reopen the hearing and record based upon newly discovered evidence which consisted of employee time cards. The Intervenor's contention that employee time cards are newly discovered evidence is without merit. There has been no showing that the Intervenor did not know of the existence of the employee time cards or that the time cards were unavailable or not obtainable by subpoena. See *Manning, Maxwell & Moore, Inc.* v. *N.L.R.B.*, 324 F.2d 857 (C.A. 5, 1963); *N.L.R.B.* v. *Jacob E. Decker and Sons*, 569 F.2d 357 (C.A. 5.)

Intervenor's second ground to reopen the hearing and record is based upon the hear [sic] officer's limitation of the examination of Petitioner's witness, Leadperson John Cantrell. The hearing officer did not abuse his discretion in so limiting the Intervenor and further, in view of my findings herein, the Intervenor was not prejudiced by the hearing officer's ruling. Therefore Intervenor's Motion to Reopen the Hearing and Record is hereby denied.

The Intervenor's contention that the unfair labor practice charge filed January 8, 1979, against the Employer in Case 10-CA-14290 should have blocked the proceeding herein is without merit. The Regional Director has discretion in determining whether an unfair labor practice charge warrants blocking a representation hearing.

[4] The Employer is a Delaware Corporation with an office and place of business located at Ellijay, Georgia where it is engaged in the manufacture of appliance controls. During the 12 months preceding the hearing, a

Continued

3. The labor organization involved claims to represent certain employees of the Employer.

4. No question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

5. The Petitioner seeks an election to determine whether a majority of the employees in the following unit desire the Intervenor to continue in its status as the employees' bargaining representative:

> All full-time and regular part-time production and maintenance employees employed by the Employer at its Ellijay, Georgia facility including electronic equipment technicians and local truck drivers, but excluding all office clerical employees, technical employees, professional employees, guards and supervisors as defined in the Act.[5]

The only issue involved herein is whether leadpersons employed by the Employer are supervisors within the meaning of Section 2(11) of the Act and should, therefore, be excluded from the above unit. The Petitioner and the Employer, contrary to the Intervenor, would include the leadpersons in the unit.[6] For the following reasons I conclude that leadpersons are supervisors within the meaning of Section 2(11) of the Act:

Although not specifically included in the unit description, the wages of leadpersons are included in the expired collective bargaining agreement. However, this alone is not determinative of supervisory status within the meaning of the Act.[7] At the time of the Intervenor's certification the Employer employed approximately 74 employees, five of whom were working supervisors, now classified as leadpersons. The plant then expanded to two facilities, the existing facility housing the assembly department and a new facility for the fabrication department.[8] Total employee complement increased to approximately 320 employees and 19 leadpersons.

Leadpersons maintain production records, initial and verify employee production cards, review computer printouts which reflect the production efforts of each employee and warn employees when they are not meeting production requirements. Errors on production cards are corrected by leadpersons. Such authority is an indicia of supervisory status. *J. K. Electronics, Inc. d/b/a Wesco Electrical Company*, 232 NLRB 479 (1977). Moreover, each leadperson has a desk and telephone which production employees are not permitted to use.

As a further indicia of their supervisory status, leadpersons assign work and transfer employees among jobs and departments without consulting higher level supervisors.[9] They fill out personnel requisition forms when they determine a need for additional employees in their department. Leadpersons correct errors on employee time cards and release employees when there is a lack of work. *See Murray Equipment Company, Inc.*, 226 NLRB 1092 (1976).

Leadpersons independently grant time off, select employees for overtime and excuse employee absences. Employees are subject to discipline if they do not get permission from the leadperson to take time off from work, thus reflecting further supervisory authority.[10] *The New Jersey Famous Amos Chocolate Chip Cookie Corporation*, 236 NLRB 1093 (1978). New employees are informed that they will be "working for" their leadperson and that they should do as their leadperson tells them. When an employee needs supplies or has a problem on the job, they go to their leadpersons.

Thus, the leadpersons have been placed by the Employer in a position of authority such that employees reasonably look to them as supervisors. *Screwmatic, Inc.*, 218 NLRB 1373 (1975). The record shows that the employees see the stipulated supervisors on an infrequent basis,[11] while they have daily contact with their leadperson.

Leadpersons, like production employees, are hourly paid, on the time clock, and work on the line for some part of the day.[12] In contrast to the production employees, however, leadpersons have a designated parking area and substitute for stipulated supervisors when they are on vacation or absent due to illness.

The record shows that there are 230–240 employees on two shifts employed at the Assembly Plant. Accord-

representative period herein, the Employer sold and shipped goods valued in excess of $50,000 directly to customers located outside the State of Georgia.

[5] The unit as stated is identical to the unit certified in Case 10-RC-10415, as clarified by a Decision and Clarification of Bargaining Unit which issued in Case 10-UC-70 on April 29, 1976.

[6] The record testimony focuses on the job duties of leadpersons Primy Davenport, Jace Smith, Wayne Holt and Maybelle McClure. None of the parties contend that these leadpersons are not representative of all leadpersons employed by the Employer. Further, the hearing officer directed the parties to specify when testimony did not apply generally to all leadpersons employed by the Employer.

[7] *Gerbes Super Market Inc.*, 213 NLRB 803, 807 (1974).

Leadpersons, formerly called "working supervisors," were challenged by the Intervenor in the election held in Case 10-RC-10415. The challenges were not determinative of the election's outcome. During the negotiations following certification, the title "working supervisors," was changed. Apparently, the job duties remained the same.

[8] When the fabrication department was moved to its new facility in January 1978, the Employer withdrew recognition from the Intervenor as representative of the employees in the fabrication department, and further refused to apply [the] then existing collective bargaining agreement to those employees. Pursuant to an unfair labor practice charge filed in Case 10-CA-13361, the Board found that the Employer's withdrawal of recognition from the Intervenor and refusal to apply the contract at its fabrication plant violated Section 8(a)(5) and (1) of the Act. *Robertshaw Controls Co.*, 240 NLRB 1260 (1979).

[9] The parties stipulated on the record that the following individuals are supervisors within the meaning of Section 2(11) of the Act: Quality Control Manager Vic Davis, Fabricating Manager Dave Parks, Assembly Manager George Hall, Second Shift Supervisor Elmer Davis, Tool Engineer Charles Owensby, Quality Control Supervisor Charles Thurman, MS Line Supervisor Horace Townsen, Shipping Supervisor Marie Overton, Production Control Supervisor Bob Storey, Industrial Engineer Loy Jarrett, Second Shift Supervisor Jerry Schmidt and Supervisor Clarence Farist. I find that such stipulation is not contrary to law or fact and, therefore, find the aforenamed individuals to be supervisors within the meaning of the Act.

[10] One employee filed a grievance after receiving a reprimand for not getting permission from her leadperson to have time off from work. The Employer's response to the grievance was that absences must be excused by the employee's leadperson or supervisor.

[11] Sometimes as long as three months pass before employees have any direct contact with their stipulated supervisors.

[12] The record is unclear as to the exact proportion of time leadpersons spend doing production work. One employee estimated 40 percent.

ing to the Employer, Industrial Engineer Loy Jarrett supervises one leadperson and the other supervisors in that plant. Quality Control Manager Vic Davis supervises approximately 10 employees. Tool Engineer Charles Owensby supervises 3 employees. The remaining six supervisors are responsible for the remainder of the employees in the plant. This results in a ratio of one supervisor for every 40 nonsupervisory employees. By the inclusion of the approximately 13 leadpersons as supervisors, the ratio is approximately one supervisor for 16 nonsupervisory employees.

The record further reflects that there are about 100 employees employed on two shifts at the Fabricating Plant. Of these employees, according to the Employer, five are supervised by Quality Control Manager Vic Davis, two by Tool Engineer Charles Owensby and 25 by Second Shift Supervisor Elmer Davis. It is suggested, therefore, that the remaining employees are supervised by Fabricating Manager Dave Parks and Quality Control Supervisor Charles Thurman. Thus, the ratio is one supervisor for every 35 nonsupervisory employees. If the six leadpersons are included as supervisors, the ratio is one supervisor for every 15 nonsupervisory employees. The ratio of supervisors to nonsupervisory employees is a further indication of the supervisory status of leadpersons.[13]

Leadpersons responsibly direct the work force and use independent judgment in the performance of their duties.[14] The foregoing, including the independent authority of leadpersons to grant time off, excuse absences, correct time and production cards, discipline and direct employees, and the disproportionately high ratio of supervisors to nonsupervisory employees which would occur absent leadpersons being supervisors, compel the finding that leadpersons are supervisors within the meaning of Section 2(11) of the Act.[15]

In view of my finding that leadpersons are supervisors within the meaning of the Act, an administrative investigation was conducted pursuant to the Intervenor's collateral attack on Petitioner's showing of interest alleging that leadpersons engaged in the solicitation of a substantial number of signatures comprising Petitioner's showing of interest. This investigation revealed that leadpersons, to a significant extent, engaged in the solicitation of employee signatures in support of Petitioner's showing of interest.[16] The supervisory participation herein is such that I find the petition to be tainted so that it may not reflect the true desires of the solicited employees. *National Gypsum Company*, 215 NLRB 74 (1974). I shall, therefore, dismiss the petition.[17]

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is, dismissed.[18]

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[13] A ratio of one supervisor for 26 employees on two shifts was held to be disproportionately high and an indication of supervisory authority. *The New Jersey Famous Amos Cookie Corporation, supra*. See also *Paramount Trends, Inc.*, 222 NLRB 141 (1976); *Russell S. Kribs Associates, Inc.*, 181 NLRB 1109 (1970); *Sagamore Shirt Company d/b/a Spruce Pine Manufacturing Company*, 166 NLRB 437 (1967).

[14] The duties which make an individual a supervisor under Section 2(11) of the Act are read in the disjunctive, so that any one of the requirements will make an individual a supervisor. *Wright, Schuchart, Harbor/Boecon/Bovee, Crail/Geri, A Joint Venture*, 236 NLRB 780 (1978); *Flexi-Van Service Center, A Division of Flexi-Van Corporation*, 228 NLRB 956 (1977).

[15] The record does not support the Petitioner's contention, as stated in its brief, that if some leadpersons perform supervisory tasks they do so without authorization by the Employer.

[16] Further, the Petitioner presented the names of ten leadpersons who actively engaged in the solicitation of employee signatures in support of the petition.

[17] Moreover, after the close of the hearing, during the investigation of an unfair labor practice charge filed in Case 10-CA-14290, it was determined that the Employer was not yet in compliance with the Administrative Law Judge's Decision and Recommended Order in Case 10-CA-13361, which decision was affirmed by the Board in *Robertshaw Controls Co.*, 240 NLRB 118 (1979). See footnote 8, *supra*. Inasmuch as the Employer withdrew recognition from the Intervenor as representative of the employees in the fabrication department and failed to apply the collective bargaining contract to that portion of the unit employees, the Employer's unfair labor practices may have been the precipitating factor that led to the decertification petition.

[18] Under the provisions of Section 102.67 of the Board's Rules and Regulations, Series 8, as amended, a request for review fo this decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1717 Pennsylvania Avenue, N.W., Washington, D.C. 20570. This request must be received by May 9, 1979.